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Alice Loos v. Mountain Fuel Supply Company and Utah Motor Park Incorporated : Reply to Brief of Respondent and Supplemental Brief

Utah Supreme Court

6211

No. 6211

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ALICE LOOS,
Plaintiff and Respondent,

vs.

MOUNTAIN FUEL SUPPLY COMPANY, a corporation, and UTAH MOTOR PARK INCORPORATED, a corporation,
Defendants and Appellants.

REPLY TO RESPONDENT'S BRIEF AND SUPPLEMENTAL BRIEF BY APPELLANT MOUNTAIN FUEL SUPPLY COMPANY

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INDEX OF CASES CITED BY RESPONDENT AND REFERRED TO HEREIN

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Replying to Respondent's Brief, Appellant, Mountain Fuel Supply Company respectfully submits the following:

It is conceded by Respondent that the doctrine of res ipsa loquitur does not apply to the Gas Company in this case. Since that doctrine is not applicable to the Gas Company there can be no inference of negligence on the part of the Gas Company from the mere happening of

the explosion. The plaintiff must prove some act of negligence on the part of the Gas Company alleged in the amended complaint, which caused the explosion. It is alleged in paragraph 7 of Plaintiff's amended complaint, "that by reason of such negligent acts and omissions on the part of the Defendant's said pipes and connections were cracked and broken and gas in large quantities leaked into the area under said floor and became mixed with the air therein and was not permitted to escape therefrom on said 22nd day of January, 1938, and became ignited and exploded . . . " (Tr. 17, Ab. 7.)

In the first place there is no evidence in the record that any pipes or connections were cracked or broken or that the explosion resulted from gas from any cracked or broken or defective pipe or appliance.

In the second place there is no evidence that the Gas Company was guilty of any of the acts of negligence set forth in Plaintiff's amended complaint.

The First Act of negligence set forth in the amended complaint is that defendants "excavated a pit for the installation and installed therein a furnace at or near the center of said building, equipped with a pilot light as aforesaid, and so near the foundation and support of said building under said partition separating said apartment as to permit the same to settle and the weight thereof to rest upon the pipes so furnishing gas to said furnace so projected through the said partition between

said apartments." (Tr. 17, Ab. 6.) *There is no evidence in the record that the Gas Company furnished or installed the furnace or dug the pit for its installation or installed the pipes or their connections or that it constructed or had anything to do with the construction of said building.* Nor is there any evidence as to how the furnace was installed or as to how the building was constructed and there was no evidence that there was any weight, strain or stress on the pipe furnishing gas to the furnace.

The Second Act of negligence set forth in the Amended Complaint is: that the defendants "failed and omitted to provide proper and sufficient ventilation for the area under said apartment." *The evidence is that there were two ventilators in the foundation of said building. There is no evidence that the Gas Company had anything to do with the construction of the buildings or the ventilation and there is no evidence that those ventilators were inadequate.*

The Third Act of negligence set forth in the amended complaint is: That the defendants " . . . closed or permitted the small openings provided as ventilators to be closed and obstructed." (Tr. 17, Ab. 6.) *There is no evidence that the Gas Company closed or obstructed those ventilators nor that it had any notice or knowledge that the same were in any way obstructed or closed.*

The Fourth Act of negligence set forth in the amended complaint is: that the defendants "failed and omitted to make frequent or any inspection of said pipes,

connections, or premises for the protection of the occupants of said apartments." (Tr. 17, Ab. 6.) *There was no duty on the part of the Gas Company to make inspections of the gas pipes and appliances on the premises of the Utah Motor Park.* That proposition of law is supported by the cases and authorities cited in the Gas Company Brief and in the Brief of Respondent. Suffice it here to restate the general rule as it is given in the Gas Company's Brief on page 19.

> "In the absence of notice of defects, it is not incumbent upon a Gas Company to exercise reasonable care to ascertain whether or not service pipes under the control of the property owner or consumer are fit for the furnishing of gas. As a general proposition, a person's duty can extend no further than his right power and authority to carry it out."

The Fifth Act of negligence set forth in the amended complaint is: that the defendants "continued to furnish gas under pressure to the apartment so occupied by plaintiff after they knew, or by the exercise of ordinary care should have known, that said pipes were broken, defective, and leaking gas into the area under said floor and that the ventilators thereto were closed and obstructed." (Tr. 17, Abs. 6-7.) *There is no evidence in the record that any gas pipe or connection was broken, defective, and leaking gas into the area under said floor. There is likewise no evidence that the Gas Company had any notice or knowledge of any defect in any gas pipe or connection and there is no evidence that the Gas Com-*

pany had any notice or knowledge that there were any gas odors in or about the premises involved in the explosion.

A. RECORD CONTAINS NO EVIDENCE THAT THE GAS COMPANY HAD ANY NOTICE OR KNOWLEDGE THAT GAS WAS ESCAPING FROM ANY OF THE GAS PIPES, APPLIANCES OR CONNECTIONS INVOLVED IN THIS EXPLOSION.

We take the liberty of going into this question in reply to Respondent's Brief because on page 29 of said brief Respondent itemizes the evidence which respondent contends is sufficient to show that the Gas Company did have such notice. We shall reply to each statement separately:

FIRST "(1) That the odor of gas was present in the vicinity since the month of October, 1937, and that it continued until the explosion on January 22, 1938." *The record contains no evidence that any employee of the Gas Company was on the premises of the Utah Motor Park where the odor of gas was noticeable during any of that time.* The record contains no evidence that the gas company was ever notified by any of the persons who noticed the odor of gas and the record affirmatively shows that Mr. Sheets, who was the only employee of the Park Company to whom notice was given (according to Plaintiff's witnesses), did not call or notify the Gas Company regarding any gas leak or gas odor in the vicinity of the cabins involved in the explosion.

SECOND "(2) That the Gas Company undertook to make repairs and did make them to the extent of at least 98 per cent, and must have known the general condition of the system." The record contains the following testimony of Mr. Lindholm:

> "Q. Each time you reported to the Gas Company that you had been notified of a leak in the gas appliance, or any gas leak, did the Gas Company come down and repair it?
>
> "A. Well, they have taken care of greasing valves and little items. If there is a major repair, we would have to engage a plumber to make a replacement, but they take care of practically, I would say, ninety-eight per cent of the calls, anyway.
>
> "Q. And those calls with respect to leaks in appliances.
>
> "A. Leaks in appliances, yes sir.
>
> "Q. And they repaired them each time they were notified of it?
>
> "A. Yes, sir.";

Which testimony clearly shows that the Gas Company did not undertake to make any repairs unless notified by the Park Company. It shows that the Gas Company perfomed its duty each time it was notified of a gas leak. *There is no evidence in the record that there was anything wrong with the general condition of the system.*

THIRD "(3) That its men, after making repair, took a written record, signed at the office of the Motor Park, which it may be inferred, had to be delivered to the Gas Company, and that record is in its hands and has not been produced." *There is no evidence in the record that the Gas Company ever made any repairs of any kind to any of the appliances or pipes in the cottages involved in the explosion.* The record of the repair of a leak in an appliance in some other part of the Motor Park certainly would be immaterial in this action. The records of the Gas Company were available to Plaintiff if Plaintff desired to offer them in evidence.

FOURTH "(4) That it undertook to make repairs for gas odors reported to it between October and January 22nd (Tr. 300, 301, 302):" Counsel for respondent draws that conclusion from the following testimony of Lindholm:

> "Q. During this period from say the last of December until the 22nd, or on the 15th day of January, when you left, do you recall how frequently you called the Gas Company?
>
> "A. No, I don't.
>
> "Q. You did call them during that time?
>
> "A. Well, I couldn't say that I did. I don't recall it.
>
> "Q. Beginning with say October, 1937, do you recall calling the Gas Company from that time until you left, January 15th?
>
> "A. Well, it seems to me there were quite a number of calls to the Gas Company. I don't

recall any particular calls, but I know that during the winter months with all the floor furnaces in operation, and quite a number of permanent tenants, there were calls quite often.

"Q. Do you recall whether any of these reports came from the vicinity of the Loos-Wheeler cottage?

"A. No, I don't recall any complaint being made."

That testimony does not show that the Gas Company was ever in the vicinity of the cottages involved in the explosion. Nor does it show that the Gas Company made any repairs in the vicinity of those cottages. Nor does it show that the Gas Company had any notice or knowledge that there were any odors of gas in the vicinity of those cottages.

FIFTH "(5) That it undertook to inspect when odors of Gas were reported." *The record shows that whenever the Gas Company was called by the Park Company and notified of a gas leak that it sent a man to the Motor Park who repaired the leak, or who saw to it that the leak was repaired by the Park Company.*

SIXTH "(6) That the custom had been so long continued that it must have known that the Park Company made no inspections, and only made replacements when the Gas Company reported to it that pipes had to be replaced." (Tr. 351.) The record shows that the Park Company made its investigations to determine if there were a gas leak and if there were, the gas com-

pany would be called. *There is no evidence in the record that the Gas Company undertook to inspect the pipes and appliances on the premises of the Utah Motor Park, or to recommend that pipes be replaced except when it was notified of a gas leak by the Park Company.*

SEVENTH "(7) It had, and is chargeable with notice of the highly dangerous character of its product, its tendency to escape confinement, to collect in enclosed places, and to explode." The use of gas is not dangerous if properly handled. However, it is because of the character of gas that there is a duty imposed upon a gas company when it has actual notice of a leak on the customer's premises to repair the leak or to shut off the gas. Knowledge on the part of the Gas Company that gas, if improperly handled, is dangerous does in no way show that the Gas Company had notice or knowledge of any gas leak or gas odor on the premises of the Utah Motor Park in the vicinity of the cottages involved in the explosion.

We submit that there can be no liability on the Gas Company in this case; First, because the record contains no evidence of any defective or broken pipe; Second, because there is no evidence that the Gas Company had any notice or knowledge of any gas leak or gas odor in or about the cottages involved in the explosion.

B. WE WISH TO CALL THE COURT'S ATTENTION TO THE AUTHORITIES CITED IN RESPONDENT'S BRIEF RELATING TO THE LIA-

BILITY OF A GAS COMPANY, BECAUSE AN EXAMINATION OF THOSE AUTHORITIES CLEARLY DISCLOSES THAT THEY SUPPORT THE PROPOSITIONS SET FORTH IN THE BRIEF OF THE GAS COMPANY AND THEY DO NOT SUPPORT THE CONTENTIONS OF THE RESPONDENT.

Sawyer vs. Southern California Gas Company (Cal.) 274 P. 544. In that case the evidence showed that the Gas Company turned gas on at a meter when one of the gas pipes leading from the meter was uncapped and open. Castner vs. Taconia Gas & Fuel Company (Wash.) 212 P. 283, was a case where the Gas Company had removed a meter after gas service had been discontinued. The gas was not turned off at the street but was turned off by means of a valve under the house. The pipe under the house broke and gas escaped and caused an explosion. The Court there held that there was a duty upon the Gas Company to inspect, maintain and repair the service line since it was being used by the Gas Company as a storage place for its own gas. Windish vs. Peoples Natural Gas Company (Pa.), 193 A. 1003, was a case in which a verdict was directed for the Gas Company and the judgment of the lower court was affirmed. Southern Indiana Gas Company vs. Tyner (Ind.), 97 N. E. 580, was a case where the Gas Company had been notified on at least two occasions of a gas leak and had been requested to "fix it." The employee from the Gas Company actually went to the building and inspected it. Immediately

after the explosion an open tee was found in the pipe under the floor of the building. The Court held that the knowledge of the leak acquired by the employee of the Gas Company and his negligence was imputable to the Company. Ferguson vs. Boston Gaslight Company (Mass.), 49 N. E. 115, was a case where complaint of a leak was made to an employee of the Gas Company. He promised to send a man to repair it. The man sent out to repair the leak found it in a chandelier and worked twenty minutes to repair it. The following night plaintiff was asphyxiated by gas escaping from the chandelier. The Gas Company was held liable because the work done by the man sent out by the Gas Company was not done with reasonable care, but negligently. Atkinson vs. Wichita Gas Company (Kan.), 18 P. (2d) 127, is a case where the owner of the house involved in the explosion testified that he called the Gas Company and notified the Company of a gas odor, and the Gas Company told him that the Company would take care of it. The Court held that since the Company was notified of the leak and agreed to take care of it, it was liable for failure to exercise due care with respect to the finding of the leak. The leak was discovered, after the explosion, in the service line under the building. Miller vs. Wichita Gas Company (Kan.), 33 P. (2d) 130, was an asphixiation case in which the evidence showed the Gas Company was called by phone on two occasions immediately prior to the accident, and the Gas Company informed the man who made the second call that the Company was looking after it. It was proved that the gas equipment was improperly

installed to carry off the fumes. The evidence showed that an employee of the Gas Company had inspected the appliances and that the appliances were the same when inspected as they were when accident occurred. Nonnamaker vs. Kay County Gas Co. (Okla.), 253 P. 296, involved a gas explosion which destroyed a building in Ponca City, Oklahoma. Two days before the explosion occurred the Gas Company made repairs to its own pipes along the side of plaintiff's building. The odor of gas had not been observed until those repairs were made. A tenant of the building testified that he notified the foreman in charge of the work for the Gas Company that gas was escaping either from the Gas Company's line or from the pipes in the building. Memphis Cons. Gas Co. vs. Creighton et al, 183 Fed. 552, 6th circuit, was a case where the owner of a house equipped with gas upon discovering that gas was escaping attempted to shut it off, but could not. She telephoned the Gas Company and informed it that gas was escaping and was informed that it would send someone out to take care of it. The call was made between 8 and 9 o'clock A. M. The man from the Gas Company did not arrive until 2:00 P. M. Shortly before noon the explosion occurred, injuring the plaintiff.

In all of those cases cited by Respondent the Gas Company was given actual notice, and in each case, except the one which involved the Company's own pipes, there was evidence of, the defect in the pipe or appliance, which permitted the Gas to escape.

In this case there is no evidence that the explosion resulted from gas which escaped from a broken or defective pipe and there is no evidence that anyone called or notified the Gas Company that there was an odor of gas in or about the cottages involved in the explosion. There is likewise no evidence that any employee of the Gas Company was ever at any time in the vicinity of those cottages where the odor of gas was noticeable to plaintiff's witnesses.

Assume that an employee of the Gas Company, during the time between November 1, 1937, and January 22, 1938, had made some repair to a gas appliance in some other part of the Motor Park: that could be no evidence that there was an odor of gas in the vicinity of the Loos cottage. It is not shown in the evidence that there could be any connection between a gas leak in an appliance in any other section of the park and the presence of a gas odor in the vicinity of the Loos cottage.

C. GAS COMPANY DID NOT UNDERTAKE TO MAINTAIN THE PIPES AND APPLIANCES ON THE PREMISES OF THE PARK COMPANY. NOR DID IT VOLUNTARILY ASSUME TO INSPECT THOSE PIPES OR APPLIANCES FOR LEAKS OR DEFECTS.

There is no evidence that the Gas Company ever went upon the premises of the Utah Motor Park, except when notified of a gas leak or gas odor by the Park Company. The evidence shows that when the Gas Com-

pany was notified of a leak it attended to it immediately. It is shown by the record that the Gas Company performed its duty each time it was notified. It must be remembered that the Utah Motor Park covers a large area and that there are a large number of cottages at the Motor Park. If the Gas Company were called to repair a leak in a certain cottage and it was repaired, that service would not throw upon the Gas Company the duty to go through each of the other 124 cottages at the Motor Park to determine whether there were any other leaks. The responsibility, which the Gas Company undertook, as shown by the evidence, was to fix the leak of which it was notified, and the evidence shows that in each instance when it was notified of a leak that the leak was fixed. The record contains no testimony or evidence that the Gas Company was ever requested by the Park Company to inspect all of the gas appliances and gas pipes on the premises of the Motor Park, and there is no evidence that the Gas Company ever made such an inspection.

The authorities cited by Respondent to support the contention that the Gas Company in this case assumed the responsibility of inspecting the pipes and appliances of the Motor Park do not support that contention.

The cases, in which a Gas Company has been held liable upon the theory that it undertook to inspect, all involved facts which showed that the Gas Company had actual notice of a leak or a gas odor and had promised or expressly stated that it would take care of it and then

had either failed to make any inspection or had made an inspection but had failed to find a leak which if it had exercised due care it could have discovered. Southern Indiana Gas Company vs. Tyner; Ferguson vs. Boston Gaslight Company; Nonnamaker vs. Kay County Gas Company; Memphis Cons. Gas Co. vs. Creighton, all of which have been referred to, illustrate this proposition.

Sheridan vs. Aetna Casualty Company (Wash.), 100 P. (2d) 1024, cited by Respondent in its supplemental brief is an action for injuries sustained by plaintiff as a result of falling down an elevator shaft. The action was brought against the building owner and the insurance company. The insurance company had entered into a contract with the owner of the building which provided inter-alia, "VI The Company will inspect the elevators covered hereby whenever it deems necessary and will thereupon suggest to the assured such changes or improvements as may operate to reduce the frequency and severity of injuries, but the Company shall not be liable for failure to make any such inspection or suggestion. Such inspection shall be permitted at any reasonable time." The evidence in that case showed that appellant made quarterly inspections of the elevator for a period of a year and a half preceding the accident. It also showed that the reports of the inspection were filed with the City. The court held that since the Insurance Company assumed the performance of the duty of inspecting and reporting to the city, the insurance company was responsible for the negligent manner in which it per-

formed that duty. The evidence showed that the automatic device which closed the elevator door was defective and failed to function. The facts in that case are not at all similar to the facts in this case, there the evidence showed a contract under which the insurance company was given the permission to make inspections at any reasonable time, there was evidence of quarterly inspections and reports of the inspection to the city made by the insurance company for at least a year and a half, and there was evidence that there was a defect in the automatic closing device which was known to the inspector who didn't report it. In this case there is no evidence of an inspection by the Gas Company of the pipes or appliances involved in the explosion, in fact there is no evidence that any agent or employee of the Gas Company was ever in the vicinity of the cottages involved in the explosion; there is no evidence that the Gas Company had any right to inspect the gas pipes and appliances in those cottages and there is no evidence of any defect whatsoever in any of those pipes or appliances.

The other cases cited at the bottom of the last page of Respondent's Supplemental Brief, i. e. Van Winkle vs. Am. Steam Boiler Co., 19 A. 472; Ward vs. Pullman Car Corp. (Ky.) 114 S.W. 754; Lough vs. J. Davis & Co. (Wash.), 70 P. 491 and Osborn vs. Morgan, 130 Mass. 102, are cited in the case of Sheridan vs. Aetna Casualty Company above referred to and are in no way applicable to the case at bar.

Respondent's Supplemental Brief contains a reference to Title 76, Chap. 3, Section 1, Revised Statutes of Utah, 1933. That statute does not expressly or by implication impose upon the Gas Company the duty to maintain the pipes and equipment of other, over which it has no control, free from leaks or imperfections.

Appellant, Mountain Fuel Supply Company respectfully submits that the facts assumed by Respondent, as set forth in Respondent's Brief and Supplemental Brief are not supported by the evidence as shown by the record that the propositions of law set forth therein do not apply in this case.

Respectfully presented,

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